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No. 01-1408

In The

# Supreme Court of the United States

SEARIVER MARITIME, INC.,

*Petitioner,*

vs.

BOBBY OWENS, on behalf of himself and all other employees of SeaRiver Maritime, Inc., similarly situated,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## MOTION BY THE AMERICAN WATERWAYS OPERATORS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## MOTION BY THE AMERICAN WATERWAYS OPERATORS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Applicant, the American Waterways Operators ("AWO"), moves the Court for leave to file an *amicus curiae* brief in support of Petitioner, SeaRiver Maritime, Inc. Petitioner has consented to the filing of a brief by AWO. Respondent has advised that they will not oppose a brief by AWO, but Respondent has not consented to the filing of such brief. Accordingly, Applicant seeks leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2.

## NATURE OF APPLICANT'S INTEREST

AWO is the national trade association of the U.S. tugboat, towboat and barge industry. The tugboat, towboat and barge industry is a vital link in America's transportation system.

The tugboat, towboat and barge industry consists of more than 5,000 tugboats and towboats and 25,000 barges. The industry operates along 25,000 miles of U.S. inland and coastal waterways and moves more than 800 million tons of cargo each year. The tugboat, towboat and barge industry employs more than 33,000 workers aboard its vessels and generates employment for another 30,000 workers in U.S. shipyards. In addition, approximately 500,000 workers are employed in industries that rely on materials delivered by barges.

Barge movements in the United States account for twenty percent of the coal that provides energy needed

by homes and businesses. Barges also move more than thirty percent of the oil and petroleum products required each year to fuel U.S. industry and for consumer transportation. In addition, highly maneuverable tugboats assist in the safe entry of huge ocean going ships into U.S. ports, bringing much-needed energy supplies to U.S. shores.

Currently, the tugboat, towboat and barge industry comprises the largest segment (fully 85%) of the U.S.-flag fleet. Vital to the transport of equipment and supplies to theaters of battle, the U.S.-flag fleet has worked in support of U.S. military forces during every major conflict in the past century.

For over 50 years, AWO has worked to promote a greater understanding of the unique nature of the waterborne transportation industry and its contribution to the U.S. economy. It is AWO's mission to promote the long-term economic vitality of the tugboat, towboat and barge industry and to enhance the industry's ability to provide safe, efficient, and environmentally responsible transportation, through advocacy, public information, the development of responsible legislation and regulation and the establishment of safety standards. AWO acts as the principal advocate for the tugboat, towboat and barge industry in Washington, D.C. and is involved in the development of federal and state legislation and regulation. Through a unique combination of industry standards and partnership with the U.S. Coast Guard, AWO has helped lead a dramatic reduction in oil spills over the past decade.

It is the policy of AWO to participate as *amicus curiae* only when important issues of maritime law or practice are involved, and only when a court's decision may have a substantial effect on the tugboat, towboat and barge industry.

The Fifth Circuit's holding in *Owens v. SeaRiver Maritime, Inc.*, 272 F.3d 698 (5th Cir. 2001) is of major concern to AWO and its members. The *Owens* decision has the potential to impact employers and employees throughout the tugboat, towboat and barge industry. With respect to the seaman exemption from the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, the *Owens* decision adds another piece to an already existing "patchwork quilt" of decisions which define "seaman." The mosaic of definitions among circuit courts presents special challenges to the tugboat, towboat and barge industry because its tugboats, towboats and barges regularly travel through the jurisdictions of various federal circuit courts.

## REASONS FOR REQUESTING LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The AWO is seeking to file an *amicus curiae* brief because the decision of the court below seriously undermines the purpose of the seaman exemption from the FLSA and because the decision of the court below adds to the already confused state of law interpreting the seaman exemption. Furthermore, the decision of the court below challenges this Court's instructions for interpreting exemptions from the FLSA as articulated in *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945) and gives no deference

to this Court's jurisprudence regarding the definition of the term seaman as it relates to activities long considered to be seaman's work in the service of a vessel. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997).

The parties to this litigation will present to this Court their views regarding the seaman exemption under the FLSA based upon the facts of this case and insofar as it effects the outcome of this litigation. The focus of the parties is reasonably and naturally concerned with the ultimate outcome of their case. However, as reflected in the brief herein, the ultimate decision will affect the rules that are applied to employers and employees throughout the tugboat, towboat and barge industry.

Given AWO's tugboat, towboat and barge industry-wide perspective, AWO believes it can comment objectively about the impact of the lower court's decision on the general maritime law with respect to the seaman exemption from the FLSA. AWO's *amicus curiae* brief focuses on the effect of an overly narrow interpretation of the term "seaman" and the implications such a definition has on the seaman exemption under the FLSA. The AWO

therefore respectfully moves this Court for leave to file its *amicus curiae* brief.

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## BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Waterways Operators ("AWO") respectfully submits this brief as *amicus curiae* in support of the position of the Petitioner SeaRiver Maritime, Inc. ("SeaRiver").[1]

## INTEREST OF *AMICUS CURIAE*

As recited in detail in the Nature of Applicant's Interest in the accompanying Motion, *supra*, AWO ("*Amicus*") has a strong interest in the disposition of this case. The U.S. barge and towing industry is a vital segment of America's interstate transportation system. With operations along the nation's 25,000 miles of inland and coastal waterways, including the Atlantic, Pacific, and Gulf coasts, the tugboat, towboat and barge industry is diverse in terms of geographic areas served, the types of vessels operated, the range of cargoes carried, and the types of service it provides.

As the owners and operators of commercial vessels in service under the U.S. flag, AWO members are subject to a vast array of federal statutes and regulations that govern the licensing of personnel, wages, and hours of work of the thousands of employees it supports, as well as the design, construction, equipment, manning and operation of the different types of vessels operated by AWO member companies. *See, e.g.*, 46 U.S.C. ch. 103 (protection and

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[1] Counsel for amicus curiae AWO authored this brief in its entirety. No person or entity other than AWO provided monetary support for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

relief for seamen aboard foreign and intercoastal voyages); 46 U.S.C. ch. 105 (protection and relief for seamen aboard coastwise voyages); 29 U.S.C. § 206 (minimum wage); 46 U.S.C. § 688 (seamen's remedy for personal injuries – Jones Act); 33 U.S.C. §§ 901-950 (Longshore and Harbor Workers' Compensation Act); OSHA Instruction CPL 2-1.2, Nov. 6, 1996 (OSHA/U.S. Coast Guard Authority over vessels); 46 U.S.C. ch. 37 (tank barge requirements); 46 C.F.R. pts. 30-40 (tank vessel operations requirements); 33 C.F.R. pts. 155, 156 and 157 (tank vessel oil transfer requirements); 46 C.F.R. § 15.610 (towing vessel manning standards); 46 U.S.C. §§ 7317 and 8703; 46 C.F.R. pt. 13 (standards for tankermen responsible for oil transfers to and from tank barges); 46 C.F.R. § 15.1101 (towboats which tow tank barges in coastal waters beyond the U.S. boundary line); 46 C.F.R. §§ 15.1109 and 15.1111 (requirements for crew training and limits on crew watch and rest periods).

Many of these statutes regulating various aspects of the tugboat, towboat and barge industry utilize the undefined term "seaman." The conflicting standard for defining "seaman" which exists under the Fifth Circuit's holding in *Owens v. SeaRiver Maritime, Inc.*, 272 F.3d 698 (5th Cir. 2001), especially when considered in relation to the various holdings of other circuit courts, will result in further confusion and conflict over the definition of "seaman" in future cases where the courts are called upon to define the term in the context of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.* and other federal statutes.

The conflict's effect is multiplied when applied to the tugboat, towboat and barge industry because of the transitory nature of its work. Under the current patchwork quilt of circuit court decisions, in order for an employer

to determine whether an employee qualifies for the seaman exemption to the FLSA, an employer would have to conduct a different analysis of each employee on each vessel as the vessel physically travels through the jurisdiction of the various circuit courts.

## SUMMARY OF THE ARGUMENT

"We have made a labryinth and got caught in it. We must find our way out." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) (citing *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984)).

The court below has adopted a definition of the term seaman which adds to the already confused state of the law interpreting the seaman exemption from the FLSA. Additionally, the court failed to give due deference to this Court's jurisprudence regarding the plain, and long established, definition of seaman. Further, the court has undermined the purpose of the seaman exemption from the FLSA and has challenged this Court's instructions for interpreting such exemptions.

A Writ of Certiorari should be granted in this case because the *Owens* decision is in conflict with the decisions of other federal circuit courts and because the court below decided an important federal question in a way that conflicts with relevant decisions by this Court. *See* Sup. Ct. R. 12.

## ARGUMENT

Petitioner SeaRiver has presented the following question:

> Whether federal courts, in interpreting the seaman's exemption under the Fair Labor Standards Act (29 U.S.C. §§ 207(a), 213(b)(6)), may employ a definitional standard which is different from and in conflict with the established meaning of the term under the Jones Act and the Congressional definition in other seamen legislation.

Stated another way, the question is whether it is appropriate for lower courts to reject the plain, and long established, meaning of the term "seaman" and substitute an alternative definition for the purposes of the FLSA seaman exemption.

### I. "SEAMAN" AS DEFINED BY THE U.S. SUPREME COURT

In *Wilander*, this Court discussed the doctrinal development of the term "seaman." In doing so, the Court articulated that the plain and established meaning of the term seaman included a worker whose duties "contribute to the function of the vessel or the accomplishment of its mission." 498 U.S. at 355 (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)). In 1995, this Court confirmed that, in addition to contributing to the function of a vessel or the accomplishment of its mission, a worker "must have a connection to a vessel in navigation (or to an identifiable group of such vessels), that is substantial in terms of both its duration and nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995)); *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 554 (1997)). This Court has also stated

that an employee's contribution need not aid in the navigation of the vessel. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 88 (1991). "The key to seamen status is employment-related connection to a vessel in navigation. . . . " *Id.* at 89 (citing *Wilander*, 498 U.S. at 355).

## II. CONFLICT AND CONFUSION AMONG CIRCUIT COURTS

Instead of applying the plain, established meaning of seaman, as required by this Court's rules of construction for FLSA exemptions, circuit courts have created several different definitions of the term seaman. The First Circuit has stated that the term "seaman" is a flexible term, the meaning of which depends upon the circumstances in which it is used and the purpose of the particular statute in which it occurs. *Walling v. Bay State Dredging & Contracting Co.*, 149 F.2d 346, 351-52 (1st Cir. 1945). The Third Circuit has also veered off course by indicating that a seaman is an employee who signed articles and worked on an employer's vessel during the navigation period. *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405, 408 (3rd Cir. 1947). The Sixth Circuit ruled that an employee was a seaman when he:[2] (1) signed "articles", (2) ate and slept on board, and (3) was subject to discipline as a seaman and member of the crew. See *Weaver v. Pittsburgh S.S. Co.*, 153 F.2d 597, 601 (6th Cir. 1946). The Eighth Circuit stated that the term "seaman" should be given its "literal meaning as denoting one whose duties are maritime in character and rendered on a vessel in navigable waters."

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[2] AWO recognizes that many women are employed in the tugboat, towboat and barge industry. For the sake of brevity, men and women are collectively referred to as "he" in this brief.

*Sternberg Dredging Co. v. Walling*, 158 F.2d 678, 681 (8th Cir. 1946). The Ninth Circuit has stated that an employee is a seaman if he performs services which are "rendered primarily as an aid in the operation of a vessel as a means of transportation, provided he performs no substantial amount of work of a different character." *Worthington v. Icicle Seafoods, Inc.*, 796 F.2d 337, 338 (9th Cir. 1986) (citing 29 C.F.R. § 783.31). Finally, the Fifth Circuit has ruled that an employee who primarily engages in seaman's work is not a seaman if as little as twenty percent of his time is spent on non-seaman's work. *Owens*, 272 F.3d at 703-704; *Martin v. Bedell*, 955 F.2d 1029, 1036 (5th Cir. 1992). Thus an employee in the Fifth Circuit who spends the great majority of his work as a seaman is no longer a seaman because he has incidentally engaged in non-seaman's work. *Id.*

When examining the restrictive definitions of "seaman" that have been promulgated by various courts in connection with the seaman exemption from the FLSA, it appears from a historical perspective that the courts were influenced by a line of decisions interpreting coverage under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950.[3] *Gale v. Union Bag & Paper Corp.*, 116 F.2d 27, 28 (5th Cir. 1940); *Bolan v. Bay State Dredging & Contracting Co.*, 48 F. Supp. 266, 268-269 (Mass. Dist. Ct. 1942). The source of confusion over the differing definitions of seaman has roots in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940). *Wilander*,

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[3] *Amicus* recognizes that, in order to effectuate the LHWCA, a distinction must be drawn between land-based and non-land-based seamen's work. The reason for such distinction does not apply to the seaman's exemption of the FLSA.

498 U.S. at 349. In *Bassett*, the Court construed the extent of coverage under the LHWCA, holding that a deckhand on a lighter was not a "member of a crew" because to be such he would have had to be on board primarily to aid in the navigation. *Id.* at 349-350 (citing *Bassett*, 309 U.S. at 260). Later, in *Wilander*, the Court stated: "By the late 19th and early 20th centuries federal courts abandoned the navigation test altogether, excluding in the class of seaman those who worked on board and maintained allegiance to the ship, but who performed more specialized functions having no relation to navigation." 498 U.S. at 345.

There is no reason to apply an unnecessarily narrow definition of "seaman" that has for other statutory purposes been rejected.

The implications of an overly narrow definition of "seaman" in the maritime compensation arena are far reaching.

## A. IMPACT ON SEAMAN EXEMPTION

Under the current standards being used to classify employees as seamen subject to the FLSA exemption, an employee's work or activity must aid in the navigation or transportation of the vessel. *Knudsen v. Lee & Simmons, Inc.*, 163 F.2d 95, 97 (2nd Cir. 1947); *Owens*, 272 F.2d at 701 (citing *Gale*, 116 F.2d at 28). Applying this standard, employees in any of the following positions could be subject to having their status as a seaman challenged: (1) licensed tankerman loading and unloading inland or oceangoing barges whether assigned to a particular tow or otherwise; (2) stewards; (3) maintenance personnel; (4) a chief mate on any tanker who does not stand a navigation watch, but who supervises vessel repair work while

the vessel is at sea and who supervises the loading and unloading of a vessel when in port; (5) engineers; (6) radio operators; (7) firemen; (8) pursers; (9) surgeons; (10) cooks; and (11) bartenders and croupiers on gambling or cruise vessels.

Similarly, deckhands working on large inland waterway tows, which consist of a towboat and multiple barges, may lose their seaman status because much of their work during the actual tow includes maintenance and housekeeping duties. Following the Fifth Circuit's reasoning, this type of activity might not be considered seaman's work because it does not contribute to the transportation function of the tow.

To illustrate further and to borrow an analogy from the American Trial Lawyers Association's *Amicus Brief* in *Wilander*, Ishmael of the PEQUOD (referring to Herman Melville's *Moby Dick)*, would meet the seaman's exemption from the FLSA but Queequeg, the harpooner, would not because his job did not relate to the transportation function of the whaling ship. Further, neither Queequeg or Ishmael would be considered engaged in seaman's activities under the Fifth Circuit's interpretation of the FLSA seaman's exemption while participating in the pursuit of a whale in one of the PEQUOD's whale boats.[4] While this analogy may be outdated in terms of modern day commercial marine activities, it does reflect the problems illustrated by this ever encroaching line of cases narrowly interpreting the FLSA seaman's exemption.

In *Owens*, the Fifth Circuit failed to recognize the changing nature of the marine transportation business

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[4] Both Ishmael and Queequeg might possibly qualify for the fisherman exemption from the FLSA. 29 U.S.C. § 213(a)(5).

and how those changes impact the nature of the work and duties of those employed in this highly specialized and heavily regulated industry.

> Prior to the advent of steamships, admiralty judges used navigational duties as the basis for determining who was a seaman or crewmember. When steam replaced sail as the main motive power for vessels, the duties of the laborers on the voyage changed. While seamen originally had to *'hand, reef and steer'* their vessels, the new steamships required laborers who worked with boilers, fuel, and a host of new cargoes. In *Winn*, Justice Story freed the word 'crew' from restriction to laborers with navigational duties to include the ship's company. After *Winn*, the definition of the terms crew member and seaman became based on the worker's connection to the vessel and were expanded to encompass all the officers and common workers who labored on the voyage. Justice Story's analysis 'opened the door to permit such workers as bartenders, horsemen and muletters, coopers, pursers, cooks and stewards, and a host of others to attain seaman status.' By the end of the Nineteenth Century, most admiralty judges, . . . had adopted the rule that it is the connection to the vessel that is the important issue, so that all of the 'co-laborers in the leading purpose of the voyage' had status as a seamen . . . . and rejected tests based upon a worker's navigational duties.

The Honorable John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. Mar. L. & Com. 249, 259-260 (1993). (emphasis in original) (citations omitted). Modern technology has changed the way seaman perform the everyday tasks associated with their employment. In some cases the work performed in connection with the utilization of this technology did not even exist

when the FLSA was enacted. For example, modern electronic sonar/depth sounders have replaced the task of heaving the lead line to measure the depth of water. The device makes the measurement. The person using the equipment only observes the result. Even steering a vessel is no longer performed in the same manner. Most mechanical steering has been replaced with a combination of hydraulic electrical or electronic assisted steering equipment. The equipment does the actual work of moving the vessels' rudders. The pilot or helmsman only directs the vessel's heading. Similarly, modern engines are controlled from the bridge on even the largest of ships. As a result of engine room automation, an engineer's job is now focused more on monitoring and maintenance rather than actually controlling the engines by having his hands on the throttle. Under the Fifth Circuit's definition of seaman, these ~~modern~~ day functions might not be considered seaman's work or even tasks associated with the calling. In fact, if courts continue along the current line of cases, there will be more individuals outside the exemption than covered by it even though such individuals, for any other purpose, would be considered seamen under any plain meaning given to or applied to that term. While *Wilander, Chandris, Gizoni* and *Papai* deal with the issue of seaman's status from the personal injury perspective, this Court has nevertheless recognized the ever changing roles of seamen in the context of technological changes in the tugboat, towboat and barge industry and the different types of work they perform. *Wilander,* 498 U.S. at 344-345 (discussing that general principles of maritime law must be adjusted to a changing industry).

*Amicus* is particularly disturbed by the criteria being used to determine which activities are seaman's duties.

Specifically, to hold that loading and unloading a vessel are not seaman's duties and that such activities have nothing to do with a vessel's general transportation function is an incorrect statement of what has been recognized in the maritime law for decades. In *Seas Shipping Co. Inc. v. Sieracki*, 328 U.S. 85, 96 (1946) this Court recognized that historically the work of loading and unloading was the work of "the ship's service, performed until recent time by members of the crew." *Id.*[5] To hold that loading and unloading is not a maritime activity because it does not contribute to the transportation function of the vessel flies in the face of this Court's statement in *Atlantic Transport* and it completely ignores the functionality and purpose for which a vessel is constructed. Commercial vessels are built to transport cargo by water, however, the proper loading and safe stowage of the cargo is not only related to the safe transport of the cargo but to the safety of the ship itself. *Id.* Improperly stowed cargo can shift during a voyage and can result in either damage to the ship or in the extreme case, loss of the vessel and its crew. Improper loading or discharge of a cargo, particularly liquid bulk cargoes, can result in severe damage to the vessel while it is being loaded, unloaded or in transit.

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[5] When addressing the contention that loading was not a maritime service and therefore not within admiralty jurisdiction, this Court commented that "[u]pon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'." *Atlantic Transport Co. of W. Va. v. Imbrovek*, 234 U.S. 52, 61-62 (1914).

*Amicus* calls the Court's further attention to the fact that, for vessels in the bulk petroleum and chemical trades, the crews of such vessels are employed in the conduct of loading and unloading of such vessels and have been from the time these special purpose vessels entered service in the nineteenth century. This occurs without exception on board all U.S. flag tank ships and tank barges.[6] In the inland barge trades, licensed U.S. Coast Guard documented tankermen are either assigned as part of the crew of the towing vessel transporting the barges or, as in the case with Mr. Owens, they are assigned to such barges in order to load and unload them. In the instant case, a Strike Team Coordinator employed by SeaRiver was responsible for all activities connected with the loading and/or discharge of cargo. An improperly loaded or discharged barge creates a potential for the capsizing, overstressing, and breaking apart of a vessel.

## B. IMPLEMENTING OVERLY NARROW STANDARD IS IMPRACTICAL

Under *Owens*, an employee is a seaman if (1) the work he is performing is characterized as seaman's work and (2) he does not spend more than twenty percent of his time on non-seaman's work. *Owens*, 272 F.3d at 702.

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[6] Any tank barge which is subject to regulations under 46 U.S.C. ch. 37 must employ a tankerman. 33 C.F.R. pt. 156. For an individual to be licensed as a tankerman he must have been issued merchant mariners documents pursuant to 46 U.S.C. § 7302 with the endorsements required under 46 U.S.C. § 7317. "Merchant mariner's documents shall be retained by the seamen to whom issued." 46 U.S.C. § 303. Thus, for the purpose of issuing merchant marine documents, the Coast Guard considers tankermen to be seamen.

Under this analysis, even when an employee is primarily engaged in seaman's work, and even though an employee is spending the vast majority of his time performing seaman's work, he will not be a seaman if his other incidental duties involve non-seaman's work.[7] Furthermore, under *Owens*, when an employer is attempting to characterize an employee's work as seaman's work or non-seaman's work, part of that analysis must include an analysis of whether the work was performed for someone who was, in turn, a seaman. *Owens*, 272 F.3d at 702 (citing *Bedell*, 955 F.2d at 1035-1036).

An impractical analysis will be required in order to show that no more than twenty percent of an employee's time is spent on non-seaman's work.[8] Even the Fifth Circuit has recognized the inherent problems in applying

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[7] In contrast, the dissent in *Papai* stated that they believe one who is involved in seaman's work seventy percent of the time is a person who "would have the status of a seaman, and both the employees and the employers would be aware of this reality about their environment." 520 U.S. at 562. (Stevens, J., dissenting.)

[8] To provide a simple illustration of the impracticality of the rule given in *Owens*, one need only imagine the following analysis for employees who are cooks and who have prepared pancakes in a galley on board a vessel. Step One: characterize the preparation of the pancakes as, generally, seamen's work and continue to the next step. Step Two: determine who ate the pancakes. Step Three: for each person who ate pancakes, determine how many of them were seamen and how many of them were not seamen. Step Four: for each of the two classes of persons who ate pancakes, (seamen and nonseamen) determine the total amount of pancakes consumed by each class. If more than twenty percent of the pancakes were consumed by non-seamen, then the cooks are not seamen. It would be impractical to expect an employer to accumulate the type of data required

a restrictive interpretation of the seaman exemption, stating "[w]e are reluctant . . . to apply the twenty percent rule in a strict, mechanical fashion. . . . [because] the amount of non-seaman's work an employee performs can vary from week to week." *Id.* at 702 n.5. The court further stated that in any given week, a

> crew member may, *without* any change in basic assignment or position, spend more than 20 percent of his time performing nonseaman's work, [but that] [t]his should not mean that the crew member loses his seaman status for that week, and in such a case–the crew member should remain a seaman unless, as a *general* matter, a substantial portion of his time was taken up by nonseaman's work. . . . Rather than focus on a week by week analysis, the determining factors should be the general nature of the work the employee most often performs in his particular position and the primary purpose of the position the employee occupies.

*Id.* at 703 n.5 (emphasis in original). While the Fifth Circuit has apparently recognized some of the problems associated with applying its rule, the Court makes no suggestion as to how its rules might be reconciled with a statute that requires that overtime wages be calculated on a weekly basis.

### C. IMPACT ON LIEN FOR WAGES

Permitting the development of the term seaman in a manner inconsistent with the general maritime law has implications not only upon the FLSA seaman exemption, but upon other seaman-related compensation laws as

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under the current definition of "seaman" especially when some of the persons for whom an employee provides services are not employees of the given employer.

well. For example, if a person is not a seaman for purposes of the FLSA, does he lose the right to a lien for wages against any vessel to which he was assigned? *See generally*, MARTIN J. NORRIS, The Law of Seamen § 20 (4th ed. 1985) (discussing general principles of maritime liens). Certainly, the Fifth Circuit's holding in *Owens* places this issue in doubt and adds confusion to the body of the general maritime law concerning the lien for wages.

### D. IMPACT ON WAGE RELATED STATUTES

In addition to the possible confusion over a seaman's lien for wages, failure to adhere to a more widely accepted definition of seaman raises doubt over who can be covered by specific statutory provisions dealing with the subject of a seaman's wages, such as the timing of payment (46 U.S.C. § 10313), garnishment rights (46 U.S.C. § 11108) and exemptions from certain state tax deductions (46 U.S.C. § 11109). None of these statutes define the term seaman, however, to be eligible for the benefits provided under these statutes, a person must be considered a seaman. *See* 46 U.S.C. §§ 10313, 11108 and 11109. Since these statutory provisions do not define the word seaman, the door is open to challenge the status of employees claiming the benefit of these provisions. There is no reason why the status of an employee could not be challenged under any of these statutory provisions upon the basis of the limited test recognized by the court in *Owens*. These problems can be avoided by following this Court's rule of statutory construction for FLSA exemptions and applying its definition of the term seaman.

## III. DEFINING "SEAMAN" FOR THE PURPOSE OF THE FLSA EXEMPTION

### A. THE LANGUAGE OF THE FLSA AND THE SEAMAN EXEMPTION

The overtime provisions of the FLSA generally provide that no employer shall employ any of its employees for a workweek in excess of forty hours unless such employee receives compensation of the excess hours at a rate of not less than one and one-half times his regular rate. 29 U.S.C. § 207(a)(1).

"Any employee employed as a seaman" is exempt from the overtime provisions of the FLSA. 29 U.S.C. § 213(b)(6).

### B. RULES OF CONSTRUCTION FOR FLSA EXEMPTIONS

In *A.H. Phillips v. Walling*, 324 U.S. 491, 493 (1945), this Court provided explicit instructions for interpreting the exemptions delineated in the FLSA. The exemptions must be "narrowly construed, *giving due regard to the plain meaning* of statutory language and the intent of Congress." *Id.* (emphasis added). The Fifth Circuit's holding in *Owens*, like other circuit court decisions, neglects these instructions giving only a cursory nod to the "intent of Congress" and largely ignoring the "plain meaning" of the statutory language, resulting in an abuse of the interpretative process and, in turn, creating an impalpable definition of "seaman." See *Owens*, 272 F.3d at 701; *Bay State*, 149 F.2d at 351.

## C. THE PLAIN MEANING OF THE TERM "SEAMAN"

In order to properly understand the breadth of an exemption, the plain meaning of the language of the statute must be identified. *A.H. Phillips*, 324 U.S. at 493. "Seaman" is a maritime term of art. *Wilander*, 498 U.S. at 342. In the absence of contrary indication, it is assumed that when a statute uses such a term, Congress intended for it to have its established meaning. *Id.* In this case, there is no indication that Congress desired a contrary meaning.[9]

This Court has long labored over the plain meaning of the term seaman and is well aware of its doctrinal development. *Papai*, 520 U.S. at 554. On at least three occasions this Court has confirmed that the plain meaning of the word seaman includes an employee: (1) whose duties contribute to the function of the vessel or to the accomplishment of its mission and (2) who has a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature. *Papai*, 520 U.S. at 554; *Gizoni*, 502 U.S. at 88; *Wilander*, 498 U.S. at 342. These decisions have provided employers and seamen alike a much needed definitional standard that gives guidance and direction in an area that, prior to these holdings, was as confused as

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[9] "The legislative history of the Act indicates a plain intention to exclude seamen from the operation of the Act. Labor organizations of seamen appeared through their representatives before the congressional Committees considering the proposed legislation. They pointed to the beneficial laws already enacted for the protection of the rights of seamen, and urged that division of jurisdiction and confusion in labor relations be avoided by excluding seamen from the operation of the provision of the bill." *Pittsburgh S.S. Co.*, 153 F.2d at 599-600.

the situation that now exists with the seaman's exemption from the FLSA.

## IV. FLSA SEAMAN EXEMPTION

While the words of the FLSA overtime provision appear to be broad, Congress has reduced the reach of the overtime provision by exempting more than twenty different groups of employees. 29 U.S.C. § 213. Included among exempt employees are any workers employed as seamen. 29 U.S.C. § 213(b)(6).

The seaman exemption came at the behest of the National Maritime Union of America and representatives of other maritime groups. In fact, at the time the original bill for the FLSA was being considered, the Sailors Union of the Pacific wrote to the Committee and stated that they did not "like to see any further or additional legislation enacted to cover a group who was already so well covered. . . . " *Bay State*, 149 F.2d at 349 (citing Joint Hearing before the Senate Committee on Education and Labor and House Committee on Labor, 75th Cong., 1st Session, pp. 545, 549).[10] Thus, it was seamen themselves who requested exemption from the FLSA.

We further call to the Court's attention the fact that individuals who are employed as seamen on either ocean going or inland and coastal vessels often choose to be so employed because of the unique circumstances of their employment. For example, many individuals work thirty

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[10] Certainly, if questioned on the issue today, the representatives of seamen who testified at the Congressional hearings advocating the seaman's exemption from the FLSA would have expected all members of their various unions, regardless of the nature of the work being performed on board vessels, to have the benefit of the exemption. See generally, *Pittsburgh S.S. Co.*, 153 F.2d at 599-600.

days on and are off for thirty days. They receive compensation for both the time they are working as well as when they are off, such time being referred to as paid leave or "comp time," *Petersen v. Interocean Ships, Inc.*, 823 F.2d 1334 (9th Cir. 1987). Owens, while a member of the Sea-River Strike Team, was employed in a similar manner.

*Amicus* believes that it was this unique way of working that motivated the seaman's unions to request an exemption from the FLSA's coverage. *Bay State*, 149 F.2d at 349. Certainly a group of employees who specifically requested exclusion from the benefit of the overtime provision of the FLSA are not in the class of employees who were in need of the remedial protection that the FLSA was intended to supply.

## V. BY DEFINING "SEAMAN" TOO NARROWLY, COURTS HAVE FRUSTRATED, RATHER THAN EFFECTUATED, LEGISLATION PROVIDING FOR A SEAMAN EXEMPTION

The FLSA is a remedial statute which "must be given a liberal construction in accordance with its obvious intent and purpose." *Bay State*, 149 F.2d at 350. However, "[k]nowing the end in view does not answer hard questions, for it does not tell us *how far* to go in pursuit of that end." *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, concurring) (citing *Rodriguez v. U.S.*, 480 U.S. 522 (1987)) (emphasis in original).

> [N]o legislation pursues its purpose at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

*Rodriguez*, 480 U.S. at 525-526 (emphasis in original).

It appears that circuit courts, while harkening to the siren song of broad coverage for remedial legislation, have veered so far off course that they have wrecked the seaman exemption upon rocky shores and rendered it useless.

## CONCLUSION

*Amicus* recognizes that there is no Congressional mandate or judicial requirement that the definition of "seaman" be the same under the FLSA, the Jones Act, or other federal statutes. However, *Amicus* does believe that the meaning of "seaman" should not evolve into a definition that no longer has any relevance to the class of persons who follow this calling and to the actual work they perform.

Therefore, *Amicus* respectfully requests that this Court confirm that the plain and established meaning of "seaman" should be applied to the FLSA seaman exemption so that lower courts may be provided with a light that will guide them away from damaging, rocky shores and back into settled waters.

Respectfully submittted,

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